

A **British American Life & General Insurance Bhd v
Pembinaan Fal Bhd & Ors**

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-247-1991
RICHARD TALALLA J
9 JUNE 1994

Civil Procedure — Summary judgment — Affidavit in support — Whether must state deponent's belief that there is no defence to the claim — Whether statement unnecessary — Rules of the High Court 1980 O 14 r 2(1)

C *Civil Procedure — Summary judgment — Delay — Change of solicitors — Whether sufficient explanation — Rules of the High Court 1980 O 14*

D The plaintiff applied for summary judgment under O 14 of the Rules of the High Court 1980. The defendants objected to the application on the grounds that: (i) Order 14 r 2(1) was not complied with, ie there was no deposition in the affidavit in support stating the belief that there was no defence to the claim; and (ii) there was delay in making the application. The plaintiff's explanation for the delay was that its former solicitors had moved to Kota Bharu and it had to engage other solicitors.

E **Held**, dismissing the plaintiff's application:

- F (1) When summary judgment is sought under O 14, its requirements must be strictly complied with and the supporting affidavit must state the plaintiff's belief as required by O 14 r 2(1) and Form 18 referred to therein. There is no question of such a statement being superfluous or unnecessary. However, the defect can be cured by a supplementary affidavit as was done in this case. Therefore, there is no merit in the first ground of objection.
- G (2) The court did not accept the plaintiff's explanation for the delay. A prudent plaintiff seeking an O 14 judgment should be ready to file the summons immediately after the defendant has entered appearance and certainly within the period prescribed for service of the defence.

H **[Bahasa Malaysia summary]**

I Plaintiff telah memohon untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan telah membuat bantahan terhadap permohonan itu atas dasar bahawa: (i) Aturan 14 k 2(1) tidak dipatuhi, iaitu affidavit yang menyokong permohonan itu tidak menyatakan kepercayaan bahawa tidak terdapat pembelaan kepada tuntutan itu; dan (ii) terdapat kelengahan apabila membuat permohonan itu. Penjelasan plaintif mengenai kelengahan itu adalah bahawa peguamcaranya yang dahulu telah berpindah ke Kota Bharu dan ia terpaksa menggaji peguamcara lain.

Diputuskan, menolak permohonan plaintif:

- (1) Apabila penghakiman terus dipohon di bawah A 14, keperluannya mesti dipatuhi dengan ketat dan affidavit sokongan itu mesti menyatakan kepercayaan plaintif seperti yang diperlukan oleh A 14 k 2(1) dan Borang 18 yang dirujukkan di dalam Aturan itu. Tidak boleh dikatakan bahawa pernyataan itu tidak perlu. Bagaimanapun, kecacatan itu boleh diatasi oleh suatu affidavit tambahan seperti yang telah dilakukan di dalam kes ini. Oleh itu, tidak ada merit di dalam alasan bantahan pertama. A
- (2) Mahkamah tidak menerima penjelasan plaintif tentang kelengahannya. Seorang plaintif yang bijak yang memohon penghakiman A 14 seharusnya bersedia untuk memfailkan saman itu sebaik sahaja defendan memasukkan kehadiran dan semestinya di dalam tempoh yang ditetapkan untuk penyampaian pembelaan. B

Cases referred to

- Le Fils Dreyfus et cie Societe Anonyme v Clarke* [1958] 1 All ER 459; [1958] 1 WLR 300 (refd) D
- First Malaysia Finance Bhd v Yeow Bon Chong* (Civil Suit No C7956 of 1985, High Court, Kuala Lumpur, unreported) [1991] Mallal's Digest 465 (not folld)
- Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (folld) E
- Sandilands Buttery & Co Ltd v Marcus Knorpel* (1959) 3 MC 244 (not folld)
- Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259 (refd)
- Tan Tik Sing v Gomez Development Co Sdn Bhd* [1979] 2 MLJ 78 (folld) F
- Tractors Malaysia Bhd v Joseph Thambirajah & Anor* [1986] 2 CLJ 72 (not folld)

Legislation referred to

Rules of the High Court 1980 O 14 r 21, O 56 r 2, Form 18 G

Davinder Kaur (Dass, Jainab & Associates) for the plaintiff.

Halim Kasim (Sykt Radhakrishnan) for the defendant.

Richard Talalla J: The plaintiff has made an application for summary judgment under O 14 of the Rules of the High Court 1980. The defendants object to the application on two grounds, firstly, that the plaintiff is in breach of r 2(1) of the said order in that in the affidavit in support there is no deposition to belief that there is no defence to the claim or at all. In answer counsel for the plaintiff cited *Sandilands Buttery & Co Ltd v Marcus Knorpel* (1959) 3 MC 244 where in a similar application the affidavit in support contained a number of defects including an omission to depose to belief as above-stated and it was held that reading the affidavit as a whole the words 'and I verily believe there is no defence to this action' were H

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- A superfluous and unnecessary and that even assuming that the original affidavit was defective that defect was cured by the supplementary affidavit. With respect when summary judgment is sought under O 14 its requirements must be strictly complied with and the supporting affidavit must state the plaintiff's belief as required by r 2(1) and Form 18 referred to therein and there is no question of such a statement being superfluous or unnecessary.
- B As stated in 1 *The Supreme Court Practice* 1993 at para 14/2/8 this statement is an essential part of the affidavit. See also the judgment of Ajaib Singh J (as he then was) in *Tan Tik Sing v Gomez Development Co Sdn Bhd* [1979] 2 MLJ 78 which I respectfully follow. I do however agree that the defect in the original affidavit can be cured by a supplementary affidavit and in this regard the *Sandiland's* case above-stated is followed. See also the said *Supreme Court Practice* at para 14/2/4 and *Le Fils Dreyfus et cie Societe Anonyme v Clarke* [1958] 1 All ER 459; [1958] 1 WLR 300. That is what was in fact done in this case and accordingly I am of the view that there is no merit in the first ground of objection.
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- D As to the second ground, the following is a chronology of events. On 14 February 1991, the writ of summons and statement of claim were filed. On 15 May 1991, an appearance was entered for the defendants. On 29 May 1991 judgment in default of defence was entered under circumstances that came to be questioned. On 9 October 1991, the plaintiff made written demand of the defendants for payment of the judgment debt. On 25 October 1991, the fourth defendant and, on 24 February 1992, the other defendants applied to have the default judgment set aside and their applications were allowed by the learned judge with costs to be in the cause which suggested that there was merit in questioning the entry of the judgment. Defences by all the defendants had been filed. By 15 May 1992, the learned judge had indicated pursuant to O 56 r 2 that no further argument was required. There was no appeal.
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Against this background of events counsel for the defendants cited the Supreme Court case of *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 where at p 135 it is stated as follows:

- G ... the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in
- H *McLardy v Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267.
- I Counsel for the plaintiff countered with the decision of Siti Norma Yaakob J in *First Malaysia Finance Bhd v Yeow Bon Chong* (Civil Suit No C7956 of 1985, High Court, Kuala Lumpur, unreported) digested in [1991] Mallal's Digest 465, where it was held that 'delay, per se, is only one of the factors to be considered in an O 14 application but on its own, it can never form

the basis of dismissal of such an application and that in that case, there had been other interlocutory steps taken by D during the period of delay and this, coupled with the fact that no prejudice had been shown to have been done to D as a result of the delay, could not form the basis of striking out P's appeal based on delay alone'. Also *Tractors Malaysia Bhd v Joseph Thambirajah & Anor* [1986] 2 CLJ 72 at p 76 where Zakaria Yatim J stated that the court had power to enter summary judgment against the defendant even though a defence had been filed and the plaintiff took some time to file the O 14 application. With respect the last two decisions would appear to have been given before judgment in the Supreme Court case above-stated was delivered and in any event must be taken to be overruled by the said judgment. For my part I am bound by the Supreme Court's decision and I follow it.

Counsel for the plaintiff then submitted that this application is distinguishable from the matter before the Supreme Court because here an explanation was indeed given. I do not accept the explanation. At least from 15 May 1992 when the learned judge indicated that no further argument was required, the plaintiff should have vigorously applied itself to filing the O 14 summons.

The plaintiff did not do so till 22 March 1993. The explanation for the delay was that the plaintiff's former solicitors had moved from Kuala Lumpur to Kota Bharu, Kelantan; when it was not stated. It was only in October 1992 that the plaintiff 'agreed' to change its legal representation to solicitors practising in Kuala Lumpur. No reason was forthcoming as to why it took the plaintiff so long to change its solicitors. It then took the plaintiff's solicitors, both past and present, a leisurely four months in exchanging correspondence relative to the present solicitors obtaining from the former the necessary documents and cause papers.

As stated by Vaughan Williams LJ in *Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259 at p 264, O 14 is a 'salutary provision for the purpose of preventing a defendant, who knows perfectly well that he owes the sum claimed, from postponing the time of payment, and putting the plaintiff to further expense in a litigation which ought never to have taken place'. The court having made available a quick remedy to a plaintiff, it is not unreasonable to require that party to seek the remedy with alacrity. A prudent plaintiff represented by a competent solicitor, seeking to take advantage of the O 14 procedure will be ready to file the summons hot on the heels of the defendant entering appearance and certainly within the period prescribed for service of the defence, at least so as to avoid the embarrassment of having to explain delay as required by the *Krishnamurthy* decision aforesaid. It is a question of acting within a few weeks if not days and not months on end as the plaintiff in this case did. The application is dismissed with costs to be taxed. I do not require further argument. A certificate is to issue if required.

Application dismissed.